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26-ORD-236

May 26, 2026

In re: Marcus Roberts/Cabinet for Health and Family Services

Summary: The Cabinet for Health and Family Services (“the Cabinet”) did not violate the Open Records Act (“the Act”) when it withheld records under KRS 61.878(1)(h) that, if disclosed, could harm its investigation through the premature disclosure of information to be used in a prospective law enforcement action.

Open Records Decision

On March 10, 2026, Marcus Roberts (“the Appellant”) submitted a request to the Cabinet seeking “records pertaining to [him] and [his] family [and] investigative reports finding evidence.”¹ On March 16, 2026, in response, the Cabinet denied the request, citing KRS 61.878(1)(h). As the basis for its denial, the Cabinet explained that disclosure would “deprive [it] and the relevant law enforcement agencies the opportunity to receive untainted information from potential witnesses and the subject of the investigation.” The Cabinet also explained that the investigative reports contain “the names of involved persons and pertinent details unknown to potential witnesses.” This appeal followed.

KRS 61.878(1)(h) exempts from disclosure “[r]ecords of law enforcement agencies . . . that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information could pose an articulable risk of harm to the agency or its investigation by revealing the identity of informants or witnesses not otherwise known or by premature release of information to be used

¹ The Appellant also included a separate, more detailed request for 77 types of records. That request sought, in part, “policies, procedures, guidelines, protocols, and training materials” that relate to “the investigation.” The Cabinet’s response appears to respond to the Appellant’s more general request, not this more specific request. Therefore, it is not apparent that the Office has jurisdiction to consider the Cabinet’s response to this request. See KRS 61.880(2)(a) (requiring an individual seeking the Office’s review to provide a copy of their request and the agency’s response to that request). Nevertheless, the Cabinet states on appeal that it would provide the requested “policies, procedures, guidelines, protocols, and training materials” that relate to “the investigation.”

in a prospective law enforcement action.” However, this exemption “shall not be used by the custodian of the records to delay or impede the exercise of rights granted by” the Act. *Id.* When a public agency relies on KRS 61.878(1)(h) to deny inspection, it must “articulate a factual basis for applying it,” such that the risk of harm exists “because of the record’s content.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013).

In *Shively Police Department v. Courier Journal, Inc.*, 701 S.W.3d 430 (Ky. 2024), the Supreme Court re-examined KRS 61.878(1)(h) and its proper invocation by law enforcement agencies. The law enforcement agency in *Shively* described two potential risks of harm: “that the requested records could potentially compromise the recollections of some unnamed or unknown witnesses and that the release of the records might taint a future grand jury proceeding.” *Id.* at 439. The Court held that, although those “may, perhaps, be legitimate concerns,” the agency had “failed to provide even a ‘minimum degree of factual justification,’ that would draw a nexus between the content of the specific records requested in this case and the purported risks of harm associated with their release.” *Id.* (quoting *City of Fort Thomas*, 406 S.W.3d at 852).

After *Shively* was decided, the General Assembly amended KRS 61.878(1)(h) in 2025. The previous version of the statute allowed the exemption only when “the disclosure of the information would harm the agency,” rather than when disclosure “could harm the agency or its investigation.” The use of “would” instead of “could” in the previous version indicates “a more stringent standard.” 06-ORD-265 n.10. In *City of Fort Thomas*, the Court held that the prior language of the statute required “a concrete risk of harm to the agency,” as opposed to “a hypothetical or speculative concern.” 406 S.W.3d at 851. “Under the amended version of the statute, where an agency need only articulate the possibility that release of information poses a threat of harm to the agency (or its investigation), the ‘risk of harm’ that must be articulated will look more like ‘hypothetical or speculative’ harms.” 25-ORD-290.

The Cabinet has explained that disclosure of the identified records could harm its ongoing administrative investigation by disclosing details not known to the public and, therefore, cause the Cabinet and other law enforcement agencies to be unable to obtain “untainted information from potential witnesses and the subject of the investigation.” The Office has previously found that such an articulation of harm is sufficient to invoke KRS 61.878(1)(h). *See* 25-ORD-319; 26-ORD-159. Accordingly, the Cabinet properly invoked KRS 61.878(1)(h) to withhold the requested records, and thus, did not violate the Act.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Pursuant to KRS 61.880(3), the Attorney General shall

be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

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/s/ Zachary M. Zimmerer
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Distributed to:

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